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SCCJA

VOL. 2 NO. 1 JANUARY 1984

Use of Evidence of Refusal

South Dakota v. Neville

The scope of the Fifth Amendment privilege against self-incrimination was examined in this drunk driver case and the U.S. Supreme Court held

> that the admission into evidence of a defendant's refusal to submit to...a [blood alcohol] test...does not offend the right against self-incrimination. South Dakota v. Neville, 32 CrL 3047 (1983)

The defendant was arrested for driving while intoxicated and read the standard Miranda rights. He was asked to submit to a blood-alcohol test and warned that he could lose his license if he refused. Neville refused to take the test, stating "I'm too drunk, I won't pass the test." The defendant was asked to take the test two additional times and refused, again saying he was too drunk to pass it.

State law specifically allows a refusal to be admitted into evidence, however, the trial court granted a motion to suppress the refusal and the South Dakota Supreme Court affirmed on the grounds that the statute which allows the introduction of this evidence violated the Fifth Amendment privilege against self-incrimination.

Justice O'Connor first discussed the 1966 case of Schmerber v. California, 384 U.S. 757, and said that the court had held that the privilege bars the state only from compelling "communications" or "testimony." Since a blood test was "physical or real" evidence rather than testimonial evidence, we found it unprotected by the Fifth Amendment privilege. South Dakota v. Neville, supra. at 3049. The Court went on to say that

> the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege.

Quoting Fisher v. U.S., 425 U.S. 391, 397 (1976). Neville, at 3048

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In this case the state gives the defendant the choice of submitting to a safe, painless and commonplace blood-alcohol test or refusing the test and having that fact admitted into evidence against him. While the presence of a choice alone does not resolve the question of compulsion, in this context, the choice, while difficult, is clearly legitimate. Since under Schmerber the state could compel the suspect to take the test, offering the option of refusal with its penalties, is no less legitimate.

> [A] refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination. Neville at 3049.

Nor is Miranda applicable in this type of situation. In footnote 15 of the majority opinion the Court says

> In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda. ...police words or actions normally attendant to arrest and custody do not constitute interrogation. The police inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects. It is similar to a police request to submit to fingerprinting or photography. Respondent's choice of refusal thus enjoys no prophylactic Miranda protection outside the basic Fifth Amendment protection. South Dakota v. Neville, 32 CrL 3047, n. 15.

Finally the court disposes of the defendant's contention that the use of his refusal violates the Due Process clause because he was not warned of the particular evidentiary consequence of refusal. The warnings given Neville by South Dakota police officers included the suspect's right to refuse; his right to have a test given by someone of his own choosing, at his own expense, and the fact that his driving privilege could be revoked for one year if he refused to submit to the offered test. The right to silence underlying the Miranda warnings is one of constitutional dimension and thus silence cannot be used against a suspect who exercises that constitutional right. The warnings challenged here are not of constitutional dimension but one of legislative grace. The court held

> that such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly "trick" respondent if the evidence were later offered against him at trial. We therefore conclude that the use of evidence of refusal after these warnings comported with the fundamental fairness required by Due Process. Neville at 3050.

The South Dakota Supreme Court was reversed.

South Dakota v. Neville is an important case in nation's attempt to control the "carnage caused by drunk drivers". Along with Schmerber, it gives the states the authority to use their "implied consent" laws in these type cases to the fullest extent. Driving privileges may be revoked for failure to consent to chemical testing and the refusal itself may be introduced as an evidentiary fact to be considered by the trial court. Since the request and refusal is outside the ambit of the Fifth Amendment, law enforcement officers do not have to be concerned with Miranda, and the use of the fact of refusal does not violate the fundamental fairness required by Due Process.

LEGAL LOG is published monthly by the South Carolina Criminal Justice Academy of which John A. O'Leary is executive director. The academy's legal affairs and legal instruction are handled by James M. Kirby, senior staff counsel, Henry R. Wengrow, general counsel and William C. Smith, Jr., staff counsel.